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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HELENE CAHEN, KERRY J. TOMPULIS, and MERRILL NISAM, RICHARD GIBBS, and LUCY L. LANGDON

Plaintiffs,

v.

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., FORD MOTOR COMPANY, GENERAL MOTORS LLC, and DOES 1 through 50,

Defendants.

Case No. 3:15-cv-01104-WHO

DEFENDANT GENERAL MOTORS LLC'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: November 3, 2015
Time: 3:00 p.m.
Judge: Hon. William H. Orrick

NOTICE OF MOTION AND MOTION TO DISMISS

TO THE COURT AND ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 3, 2015, at 3 p.m., or as soon thereafter as counsel

may be heard, in the United States District Court, Northern District of California, San Francisco Division, located in San Francisco, California, Courtroom 2, before the Honorable William H. Orrick, Defendant General Motors LLC ("GM") will move and hereby does move this Court for an order dismissing with prejudice all of the claims and causes of action against GM in Plaintiffs' First Amended Complaint, pursuant to Rules 12(b)(1), 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure.

STATEMENT OF ISSUES TO BE DECIDED (L.R. 7-4(A)(3))

1. Should all claims and causes of action against GM be dismissed because Plaintiff Nisam does not allege a concrete injury in fact that would satisfy the constitutional requirements for Article III standing?

2. Should all claims and causes of action against GM be dismissed under Federal Rule of Civil Procedure 12(b)(6) because Plaintiff Nisam does not allege facts plausibly showing the essential element injury in fact?

3. Should the implied warranty claims against GM (Counts IV and VII) be dismissed under Federal Rule of Civil Procedure 12(b)(6) because Plaintiff Nisam does not allege that his vehicle is "unmerchantable," *i.e.*, lacks fitness for its ordinary purpose of providing transportation?

4. Should the "breach of contract /common law warranty" claim against GM (Count V) be dismissed under Rule 12(b)(6) because Plaintiff Nisam does not allege the essential terms of any contract with GM or any warranty issued by GM?

5. Should the invasion of privacy claim against GM (Count VIII) be dismissed under Rule 12(b)(6) because Plaintiff Nisam does not allege a serious invasion of a legally protected privacy interest as required by the California Constitution?

6. Should the fraud-based claims against GM (Counts I, II, III and VI) be dismissed under Rule 9(b) because Plaintiff Nisam does not plead those claims with particularity and under Rule 12(b)(6) because plaintiff does not allege reasonable or justifiable reliance on any GM statement?

This Motion is based on this Notice of Motion and Memorandum of Points and Authorities in Support, the pleadings and papers on file, and upon such matters as may be presented to the Court at the hearing on this Motion.

Dated: August 28, 2015

CROWELL & MORING LLP

BY: /s/ Cheryl A. Falvey

Attorneys for Defendant General Motors LLC

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INTRODUCTION

This complaint spins a hypothetical story of conjecture built upon conjecture: a hypothetical "hack" requiring a hypothetical criminal "attacker" with hypothetical physical or wireless access to hypothetically seize control of a car's computer system. The facts alleged by Plaintiff Merrill Nisam (the only plaintiff asserting a claim against GM) show he has no concrete injury and therefore no standing to bring any claim against GM. Plaintiff Nisam does not allege any actual "hack" of his GM car or any "certainly impending" hack. With no allegations of injury in fact, he does not meet the first requirement for constitutional standing. Plaintiff also does not satisfy the second "traceability" prong of standing, requiring him to trace any alleged injury to the conduct of GM, because his claims rest upon a hypothetical intervening criminal act. This Court therefore has no subject matter jurisdiction because Plaintiff Nisam lacks standing and thus there is no "case or controversy" as required under Article III.

Beyond this threshold jurisdictional bar, each claim asserted against GM fails to state a claim upon which relief can be granted.

First, an allegation of injury is a required element of each of Plaintiff's claims, from the fraud-based claims (Counts I-III and VI), to the warranty claims (Counts IV, V, VII), to the privacy claim (Count VIII). His claims must be dismissed under Rule 12(b)(6) because he does not allege that a defect has manifested itself in his vehicle and he has not been harmed by any defect. With no injury, he cannot state *any* claim against GM.

Second, Plaintiff's implied warranty claims fail for the additional reason that he does not allege facts showing that his car is unmerchantable, or that he cannot use his GM car for its intended purpose of transportation. Plaintiff's "breach of contract/common law warranty" claim likewise misses the mark because it does not allege any contract with GM, any applicable warranty terms, or any breach.

Third, Plaintiff has no privacy claims under the California Constitution because he does not allege a serious invasion of a legally protected privacy interest, and California law holds that there is no reasonable expectation of privacy in the geographic location of Plaintiff's car.

Plaintiff does not allege that any "hacker" has misused any data allegedly collected by GM. Plaintiff further admits that GM discloses its pertinent practices with regard to data collection in "owners' manuals, online 'privacy statements,' and terms & conditions."

Fourth, Plaintiff's fraud-based claims cannot proceed because they are not pleaded with the required particularity under Rule 9(b). Plaintiff Nisam also does not make the required allegation that he relied on a representation or omission by GM in deciding to purchase his car. In fact, he alleges only two generic statements by GM, one of which was issued in a press release ***one year after*** his purchase. Also, Plaintiff's allegations of hypothetical or theoretical safety concerns cannot support a nondisclosure claim under California consumer statutes or a claim for alleged "fraudulent concealment."

For these reasons, all of Plaintiff Nisam's claims against GM should be dismissed.

STATEMENT OF FACTS

Five named Plaintiffs purport to bring claims against GM, Ford and Toyota on behalf of putative state-wide classes of owners whose vehicles contain a CAN bus that is connected to an integrated cell phone or Class 1 or Class 2 master Bluetooth device. Am. Compl. ¶¶ 3, 51. Only Plaintiff Nisam asserts claims against GM, alleging that in March 2013, he purchased a new 2013 Chevrolet Volt from Novato Chevrolet. *Id.* ¶ 14. He does not allege any direct contact or relationship with GM, or any request to GM to repair his car.

Plaintiffs allege that their vehicles—and every single Ford, Toyota and GM vehicle with certain computer systems—"are susceptible to hacking and [are therefore] neither secure nor safe." *Id.* ¶ 6; *see also id.* ¶¶ 8, 34. Plaintiffs allege that "an *attacker*" can "remotely and wirelessly access" the vehicle's networked computer systems, also called a "CAN bus." *Id.* ¶ 34 (emphasis added). Plaintiffs likewise allege that someone with physical access to a vehicle can "maliciously" "inject" one or more "false messages" or "manipulate packets" in transit on the computer network. *Id.* ¶¶ 33-34. According to Plaintiffs, this hypothetical unauthorized breach could potentially result in an attacker taking control of a vehicle. *Id.* ¶ 1. Plaintiffs allege work by sophisticated research institutes (the U.S. Defense Advanced Research Projects Agency and two universities) shows the theoretical ability to breach these computer systems. *Id.* ¶¶ 36-37.

Plaintiff Nisam asserts eight causes of action against GM: (1) Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*.; "UCL"); (2) Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq*.; "CLRA"); (3) False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq*.; "FAL"); (4) UCC Implied Warranty of Merchantability (Cal. Com. Code § 2314); (5) Breach of Contract / Common Law Warranty; (6) Fraud by Concealment; (7) Song-Beverly Consumer Warranty Act Implied Warranty of Merchantability (Cal. Civ. Code §§ 1791.1 & 1792); and (8) Invasion of Privacy (Cal. Const. art. I, § 1). Am. Compl. ¶¶ 62−138.

Plaintiff Nisam seeks injunctive relief, punitive damages, restitutionary disgorgement, other unspecified damages, pre- and post-judgment interest and attorneys' fees from GM. Am. Compl. Request for Relief.

LEGAL STANDARD

A suit brought by a plaintiff without Article III standing is not a "case-or-controversy" over which a federal court has subject matter jurisdiction. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where there is no "case or controversy," the suit must be dismissed under Rule 12(b)(1). *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 972-73 (C.D. Cal. 2014). The burden to establish subject matter jurisdiction rests with Plaintiff as the party asserting jurisdiction. *See Wood v. City of San Diego*, No. 03cv1910–MMA(WMc), 2010 WL 4818012, at *5 (S.D. Cal. Nov. 22, 2010); *see also United States v. City & Cnty. of San Francisco*, 979 F.2d 169, 171 (9th Cir. 1994) (the party seeking to invoke federal jurisdiction "bears the burden of establishing standing").

For a complaint to survive scrutiny under Rule 12(b)(6) "the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009); *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). Although the Court must accept well-pleaded facts as true, it need not accept as true conclusory allegations, unreasonable inferences, unwarranted deductions of fact or legal conclusions cast as factual allegations. *See*, *e.g.*, *Juniper Networks v. Shipley*, No. C 09-0696 SBA, 2010 WL 986809, at *4 (N.D. Cal. Mar. 17, 2010) *aff'd sub nom. Juniper Networks, Inc. v.*

Shipley, 643 F.3d 1346 (Fed. Cir. 2011); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). The Court also may not assume that "the [plaintiff] can prove facts that [he or she] has not alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Claims that "sound in fraud," including fraudulent concealment and statutory consumer claims premised on fraud allegations, must also meet the heightened pleading standard of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

ARGUMENT

I. PLAINTIFF LACKS CONSTITUTIONAL STANDING.

At the threshold, this Court lacks subject matter jurisdiction over GM because Plaintiff Nisam lacks standing and there is thus no "case-or-controversy" under Article III. *Clapper*, 133 S. Ct. at 1146 ("'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" (citation omitted)). Plaintiff Nisam has the burden to plead and prove facts showing he has standing. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). He must show "(1) . . . an 'injury in fact' . . . (2) [that] is fairly traceable to the [] action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Montana Envt'l. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Srvs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)); *Lujan*, 504 U.S. at 560-61.

A. Plaintiff Nisam Does Not Allege Any Concrete or Impending Injury.

To demonstrate standing, a plaintiff must allege injury that is more than speculative; it must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citation and internal quotation marks omitted). An injury that is sufficiently imminent to confer standing "must be *certainly impending*;" "'allegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (emphasis in original) (citation and alteration omitted).

1. Plaintiff Does Not Allege His Car Was Ever Hacked.

Plaintiff Nisam alleges neither actual nor "certainly impending" injury. He does not allege that his GM car has been "hacked" or that it has malfunctioned in any way. Plaintiff does not allege that his car does not operate as intended. Plaintiff likewise does not allege that his GM car in normal use will inevitably be—or will even likely be—"hacked." He only alleges fear it *might* be because it is "susceptible" to hacking. *See, e.g.*, Am. Compl. ¶¶ 5, 8. These "fears" rest entirely upon his speculation that *a* vehicle could be the subject of third-party criminal conduct, *i.e.*, "infiltrat[ion]" or "hack[ing]" by an "attacker" or other third-party who "tak[es] control of the basic functions of the vehicle." *Id.* ¶¶ 1, 4, 34. Thus, Plaintiff seems to be claiming that his mere ownership of a car that allegedly is "susceptible" to hacking constitutes injury. This is not enough for Article III standing.

Courts in this jurisdiction and nationwide regularly dismiss for lack of standing "no injury" claims by purchasers or users of products that, like Mr. Nisam's car, have not failed and have not produced injury. *Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844, *6 (N.D. Cal. June 18, 2010) (dismissing with prejudice), *aff'd and rev'd on other grounds*, 484 Fed. App'x 116 (9th Cir. 2012) (no standing because "[p]laintiffs do not allege that their vehicles have manifested the alleged defect" or that a defect is reasonably likely to occur in their vehicles); *Whitson v. Bumbo*, No. C 07-05597 MHP, 2009 WL 1515597, at *4, *7 (N.D. Cal. Apr. 16, 2009) (no standing because plaintiff "fails to allege that her [product] manifested the purported defect"); *Riva v. PepsiCo, Inc.*, No. C 14-2020- EMC, 2015 WL 993350, at *4 (N.D. Cal. Mar. 4, 2015) (dismissing with prejudice) (no standing where plaintiffs do not allege credible and substantial risk of cancer from ingesting Pepsi products); *U.S. Hotel and Resort Mgmt., Inc. v. Onity, Inc.*, No. 13-499 (SRN / FLN), 2014 WL 3748639, at *7 (D. Minn. July 30, 2014) (dismissing with prejudice) (no standing where plaintiffs alleged hotel locks were susceptible to being hacked but were not actually hacked); *see also, e.g.*, *Harrison v. Leviton Mfg. Co.*, No. 05-cv-0491, 2006 WL 2990524, at *3 (N.D. Okla. Oct. 19, 2006) (dismissing with prejudice) (no standing where plaintiff homeowner alleged an electrical system defect creating an increased risk of fire, but no fire or damage occurred).

Further, courts find allegations of injury in fact conjectural and hypothetical when injury can occur only due to an intervening act of a third party. In *Onity,* for example, plaintiff hotel owners and operators alleged that electronic keycard-operated hotel locks were defective because they were "susceptible" to hacking. They alleged that a software engineer revealed that Onity locks could be bypassed by a homemade device created with readily available parts. 2014 WL 3748639, at *1. They made no allegation that any of their locks had ever been breached or hacked, and no allegation that the locks did not operate as intended. *Id.* at *3. Relying on a line of authority refusing to find standing based on allegations of injury that might be caused by "future unauthorized access by a third-party," the court dismissed the complaint, concluding that the potential for future unauthorized entry was not "certainly impending," and therefore did not confer standing. *Id.* "While it is possible that a potential intruder would in fact attempt to gain entry, 'allegations of *possible* future injury are not sufficient.'" *Id.* (quoting *Clapper*, 133 S. Ct. at 1147 (emphasis in original)). Citing numerous cases holding that the unauthorized collection of personal data that might at some point be hacked does not create the injury required to support Article III standing, the *Onity* court found it significant that "no such unauthorized entry could occur unless and until [a] third-party acted with criminal intent to gain entry." *Onity*, 2014 WL 3748639, at *4, *5 (citing *inter alia Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (affirming dismissal with prejudice)).

For the same reasons set forth in *Onity* and *Reilly*, Plaintiff Nisam does not have standing here. To paraphrase the *Reilly* court, allegations of injury are too speculative for Article III purposes when a plaintiff describes the manner of his injury by beginning with the word 'if': *if* the hacker breaches Plaintiff's car, and *if* he or she assumes control of it, and *if* someone is harmed, only then will Plaintiff have suffered an injury. 664 F.3d at 43.

2. Plaintiff Does Not Allege Any Information Was Ever Hacked.

Plaintiff Nisam similarly alleges that GM collects data and transmits it in an unsecure manner, rendering the data "an attractive target for hackers." Am. Compl. ¶¶ 7, 50. Plaintiff does not allege an actual breach or taking of data, nor any actual harm resulting from its collection or transmission. He does not allege that any unauthorized person obtained or used any of the data.

He makes only a conclusory and unsupported allegation that he has "suffered damage." *Id.* ¶ 138. This is not enough for standing.

Courts repeatedly have held that such vague allegations of remote future harm are insufficient. *See, e.g.*, *LaCourt v. Specific Media, Inc.*, No. SACV 10–1256–GW(JCGx), 2011 WL 1661532, at *4 (C.D. Cal. Apr. 28, 2011). Allegations of improper sharing of personal information demonstrate standing only when they are ***not*** conjectural and hypothetical. *Id.*; *see also Whitaker v. Health Net of California, Inc.*, No. 11-0910-KJM, 2012 WL 174961, at *4 (E.D. Cal. Jan. 20, 2012) (plaintiff's fear of future harm held "wholly conjectural and hypothetical" where servers containing plaintiff's personal and medical information were lost). The *Onity* court found the same, commenting that allegations of unauthorized third-party access to confidential data are insufficient to establish standing unless that data is actually used in an improper manner. *Onity*, 2014 WL 3748639, at *5. Because Plaintiff Nisam does not allege any unauthorized taking of his data, let alone use of it, or any other harm, he lacks standing to pursue this claim.[1]

3. Plaintiff's Conclusory Allegations Of Economic Loss Are Insufficient.

Recognizing the obvious deficiencies in his injury allegations, Plaintiff claims economic loss, *i.e.*, that he allegedly would not have purchased or paid as much for his car if he had known of the alleged "hackability." Am. Compl. ¶ 66. In analyzing Article III standing requirements, California federal courts consistently reject this approach, finding that bald allegations of "economic loss" do not demonstrate injury. *Lee*, 992 F. Supp. 2d at 973 (dismissing with prejudice) ("conclusory allegations" of diminished value "insufficient" to establish Article III standing); *see also Parker v. Iolo Techs., L.L.C.*, No. 12-00984, 2012 WL 4168837, at *2 (C.D. Cal. Aug. 20, 2012) (no standing where plaintiff did not plausibly allege that he experienced a product defect or paid money for a product "that [did] not function as advertised") (dismissing with prejudice). In *Lee*, a case alleging breach of warranty and California statutory unfair

[1]To the extent Plaintiff contends that the alleged mere collection of data violates Plaintiff's right to privacy, this allegation is much too vague and conclusory, and wholly without merit. *See infra* at 15-19. Plaintiff himself concedes that defendants "make drivers aware of such data collection in owners' manuals, online 'privacy statements,' and terms & conditions of specific feature activations." Am. Compl. ¶ 50.

competition claims, the court held that where a plaintiff claims "insufficient performance of a product or its features, [he] must allege 'something more' than 'overpaying' for a 'defective' product'" to establish Article III standing. *Lee*, 992 F. Supp. 2d at 973 (citing *In re Toyota Motor Corp. Unintended Acceleration Litig.*, 790 F. Supp. 2d 1152, 116 n.11 (C.D. Cal. 2011) ("When the economic loss is predicated solely on how a product functions, and the product has not malfunctioned, the Court agrees that something more is required than simply alleging an overpayment for a 'defective' product" including "having stopped using the vehicles for fear of personal safety or having sold or traded-in vehicles at a loss due to depressed resale values following recalls" or publicized accidents and deaths)).[2]

Here, Plaintiff Nisam makes no allegations that his car does not function as intended. Further still, Plaintiff alleges no facts in support of his conclusory allegations that he "would not have purchased [his] vehicle[] or would not have paid as much as [he] did to purchase [it]." Am. Compl. ¶ 66. Plaintiff does not, for instance, allege that he sold or attempted to sell or trade in his vehicle at a loss as a result of the alleged defect, or that he is unwilling or somehow unable to drive his vehicle. *See generally* Am. Compl. Plaintiff's conclusory assertions of economic loss are insufficient to establish injury or standing. *See, e.g.*, *Contreras*, 2010 WL 2528844, at *6 (dismissing for lack of standing where "Plaintiffs[']' allegation that their vehicles are worth substantially less than they would be without the alleged defect is conclusory and unsupported by any facts").

B. Plaintiff Nisam Alleges Conduct Not Traceable To GM.

Because Plaintiff does not allege or even have any injury, the Court need not address the other requirements of Article III standing. In any event, Plaintiff also does not satisfy the traceability prong of standing, requiring him to trace any alleged injury to conduct of GM, because he alleges a hypothetical intervening criminal act. The need for an intervening third-

[2] Plaintiff has not, and cannot, argue that he has suffered economic loss by the alleged collection of personal data. California federal courts have squarely addressed this issue and held allegations that the collection of personal information deprives plaintiff of its economic value do not assert the actual or imminent harm required to meet Article III standing requirements. *See, e.g.*, *LaCourt*, 2011 WL 1661532, at **3-5.

party act means the harm cannot be "traced" to GM. *See, e.g.*, *Lujan*, 504 U.S. at 560 (Article III also requires that Plaintiffs allege a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" (alterations in original) (citation omitted)); *Simon v. E. Ky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Traceability is particularly implausible where, as here, the intervening third-party conduct is criminal. *See Alston v. Advanced Brands and Importing Co.*, 494 F.3d 562, 565 (6th Cir. 2007) ("[T]he causal connection between the defendants' advertising and the plaintiffs' alleged injuries is broken by the intervening criminal acts of the third-party sellers and the third-party, underage purchasers. . . . A crime is an independent action.").

The *Onity* court recognized this additional failing, finding that the risk of unauthorized entry into hotel rooms in the future "does not present any 'certainly impending' injury, much less one that would be fairly traceable" to the hotel lock manufacturer. 2014 WL 3748639, at *3. Likewise here, any unauthorized breach of the electronic components in Plaintiff's vehicle by a third-party criminal is not conduct fairly traceable to GM.

II. PLAINTIFF NISAM FAILS TO STATE ANY CLAIMS UNDER CALIFORNIA LAW.

None of Plaintiff Nisam's claims (Counts I-VIII) survives scrutiny under Rule 12(b)(6) because he does not sufficiently allege facts showing essential elements of each of his claims.

A. The Absence Of Injury Dooms All Of Plaintiff Nisam's Claims.

Each of the claims asserted by Plaintiff Nisam has actual "injury" as a required element. He does not satisfy this element because he alleges only a "risk" of injury in the future from an alleged defect that has not manifested itself in his car. Allegations of future risk do not support claims for breach of warranty, fraud, invasion of privacy, or violation of California's consumer protection statutes.

1. Warranty Claims.

For express and implied warranty claims, without an allegation of product failure, unmanifested defect claims are subject to dismissal for failure to allege the essential element of

injury. *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999) (dismissing express and implied warranty claims where no defect manifested in vehicles' brakes); *Taragan v. Nissan N. Am. Inc.*, No. C 09-3660 SBA, 2013 WL 3157918, at *4 (N.D. Cal. June 20, 2013) (dismissing implied warranty claim as "theoretical" because "none of the Plaintiffs has actually experienced a rollaway incident"); *see also, e.g.*, *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) (dismissing implied warranty claim where no product failure and no allegation injury inevitable); *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 505 (8th Cir. 2009) (dismissing express and implied warranty claims where purported defect did not cause the feared harm); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2001) ("No injury, no tort, is an ingredient of every state's law . . . If tort law fully compensates those who are physically injured, then *any recoveries by those whose products function properly mean excess compensation*.") (emphasis added).

This Court's Taragan decision underscores the need for more than a risk of possible future harm. The *Taragan* plaintiffs' complaint alleged that their vehicles were *at risk* for a rollaway incident, but "none of the Plaintiffs ha[d] actually experienced a rollaway incident." *Id.* Thus, "[i]n asserting a warranty claim, . . . it is not enough to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that their product *actually exhibited the alleged defect*." *Taragan*, 2013 WL 3157918, at *4 (quoting *O'Neil*, 574 F.3d at 505) (alterations and internal quotation marks omitted). Plaintiff Nisam likewise alleges no injury because he never claims a "product failure" nor that his vehicle has been "hacked," just that there is a potential future risk. Without more, his warranty claims cannot proceed. Plaintiff not only got what he paid for, a car that works and that he continues to drive, but any alleged harm would necessarily depend on an intervening, criminal act. Thus, the case for dismissal here is even stronger than in *Taragan*.

2. Consumer Protection Claims.

Claims under California's consumer protection statutes also require an injury in fact. Where the plaintiff gets the benefit of his bargain, in the form of a product that performs and does not exhibit a defect, plaintiff does not assert an injury under the UCL, the CLRA or the FAL and

lacks standing to assert these claims. *Lee*, 992 F. Supp. 2d at 973 (dismissing UCL and fraud claims for failure to state a claim because plaintiffs did not allege vehicle's pre-collision system failed to operate as intended or as advertised); *Davidson v. Kimberly-Clark Corp.*, 76 F. Supp. 3d 964, 976 (N.D. Cal. 2014) ("where—as here—a consumer fails to allege facts showing that he/she experienced any harm resulting from product use, the consumer has failed to allege damage under the UCL/FAL/CLRA or common law fraud"); *Birdsong*, 590 F.3d at 961-62; *Parker*, 2012 WL 4168837, at *3; *Whitson,* 2009 WL 1515597, at *6; *see also In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d at 1017 (as noted above, actual injury is an essential element)); *Watkins v. Omni Life Sci., Inc.*, 692 F. Supp. 2d 170, 176 (D. Mass. 2010) (dismissing putative class action asserting breach of warranty, fraud and violations of consumer protection statutes, among others, because "[a]pprehension of a heightened risk stemming from an allegedly defective product that has not failed or caused harm is insufficient as a matter of law to support a claim"); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) (finding '"[p]urchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own'" (alteration in original) (citation omitted)).

Further, to satisfy the injury in fact requirement under the UCL, FAL and CLRA, a plaintiff must '"demonstrate the purchase of products *as a result of* deceptive advertising.'" *Bishop v. 7-Eleven, Inc.*, 37 F. Supp. 3d 1058, 1065 (N.D. Cal. 2014) (emphasis added); *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1129 (N.D. Cal. 2014). Thus, the "plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct." *Bishop*, 37 F. Supp. 3d at 1065. Plaintiff does not allege this and therefore his claim cannot proceed.

3. Privacy Claim.

As the foundation for his privacy claim, Plaintiff Nisam alleges that his data is being collected by GM and shared without adequate security protections and thus someday in the future might be hacked. Am. Compl. ¶¶ 49, 50. Injury is an essential element of such a privacy claim. *See LaCourt*, 2011 WL 1661532, at *4 (plaintiff must "specifically" allege that plaintiffs

"themselves were affected" by defendants' alleged practices). Because Plaintiff Nisam does not allege an actual and concrete injury caused by the alleged sharing of his personal data, his claim cannot proceed.

B. Plaintiff Nisam Fails To State A Claim For Breach Of Implied Warranty Of Merchantability (Counts IV and VII).

Plaintiff Nisam alleges two claims for breach of implied warranty; one under California Commercial Code (UCC) § 2314 (Count IV) and the other under California's Song-Beverly Act, Cal. Civ. Code §§ 1791.1, 1792 (Count VII). Beyond the lack of injury, these claims could not proceed in any event because Plaintiff does not allege facts plausibly showing that his car is not fit for its intended purpose.

Under both the UCC and Song-Beverly, a product to be merchantable must merely be "fit for the ordinary purposes for which [it is] used." Cal. Civ. Code § 1791.1(a)(2); Cal. Com. Code § 2314(a) & (c); *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1295-96 (1995) ("Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.'" (citations omitted)). To state a claim, therefore, a plaintiff must show that the product "did not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure*, *Inc.*, 114 Cal. App. 4th 402, 406 (2003). In the case of a vehicle, the plaintiff must allege that it does not serve its "ordinary purpose" of providing transportation. *Am. Suzuki Motor Corp.*, 37 Cal. App. 4th at 1296 (agreeing with courts in other jurisdictions that "in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation").

Plaintiff makes no such allegation. Specifically, he does not allege that his car actually has exhibited the alleged defect, let alone caused him to stop driving it. *See Taragan*, 2013 WL 3157918, at *4 (to maintain implied warranty claim, "'plaintiffs must allege that their product actually exhibited the alleged defect'") (internal quotation marks and citation omitted); *Lee*, 992

F. Supp. 2d at 980 (vehicle not unmerchantable where alleged defect did not cause plaintiff to stop driving); *Kent v. Hewlett-Packard Co.*, No. 09-5341 JF (PVT), 2010 U.S. Dist. LEXIS 76818, at *12 (N.D. Cal. July 10, 2010) (no unmerchantability where alleged defect did not force plaintiff to stop using computer).

Plaintiff alleges that his car is vulnerable to a malicious act of a third party intruder hacking the vehicle. The law does not recognize a potential vulnerability to be a defect that renders a car unfit for its ordinary purpose of providing transportation. Thus, Plaintiff's implied warranty claims fail as a matter of law.

Finally, Plaintiff alleges that he purchased his GM car from an independent dealer, Novato Chevrolet. Am. Compl. ¶ 14. He does not allege any facts to establish that he was in privity of contract with GM. Under California Commercial Code § 2314, a plaintiff must stand in direct contractual privity with the defendant. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). A consumer who buys from a car dealer is not in privity with the manufacturer. *Id*. Thus, Plaintiff Nisam does not and cannot allege vertical privity and his UCC implied warranty claim should be dismissed.

C. Plaintiff Nisam Cannot State A Claim For Breach Of Contract Or "Common Law Warranty" (Count V).

Plaintiff conflates two causes of action, breach of contract and common law warranty, into a single claim. Yet Plaintiff does not allege the terms of a specific oral or written contract with GM, nor attach any alleged contract to the complaint, nor identify contract provisions that have been breached. The same is true for the common law warranty claim. The complaint does not allege the terms of the warranty, what language creates it, or where that language can be found.

Plaintiff does not plead the essential elements of a breach of contract claim: (1) a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010) (emphasis omitted). Only in conclusory terms does Plaintiff allege the existence of a purchase contract with GM and even that conclusory allegation (with no supporting factual content) conflicts with his earlier admission that he purchased his car from a dealer. *See* Am. Compl. ¶¶

14, 104. Conclusory allegations are insufficient to support a claim for breach of contract. *See Lee*, 992 F. Supp. 2d at 981 (citing, *inter alia*, *Zody v. Microsoft Corp.*, No. 12–cv–00942–YGR, 2012 WL 1747844, at *4 (N.D. Cal. May 16, 2012)). Instead, Plaintiff Nisam must allege the specific terms of the contract with GM,[3] and say whether it is oral or written. *Alvarado v. Aurora Loan Servs., LLC*, No. 12-0254, 2012 WL 4475330, at *4 (C.D. Cal. Sept. 20, 2012) (written contract "must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference"); *Castro v. JPMorgan Chase Bank, N.A.*, No. 14-cv-01539, 2014 WL 2959509, at * 2 (N.D. Cal. June 30, 2014) ("To allege a breach of contract claim, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct.") (citing Cal. Civ. P. Code § 430.10(g)). Plaintiff obviously has done none of these things.

To the extent the "breach of contract/common law warranty" claim seeks to advance a common law warranty claim, *i.e.*, a claim under an express warranty outside the GM limited new vehicle warranty, it once again fails to plead essential elements: "To plead an action for breach of express warranty under California law, a plaintiff must allege (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury." *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 986-87 (N.D. Cal. 2009); *see also Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *4 (N.D. Cal. June 5, 2009) (California warranty law requires a plaintiff to prove that the defendant breached an express promise regarding its goods). The complaint does not allege the terms of any warranty, or describe any express promise, and thus provides no plausible factual basis for a "common law warranty" claim.

Plaintiff abandoned a warranty claim in the original complaint deleting references to the express limited warranty contained in his owners' manual. *Compare* Compl. ¶ 53 *with* Am.

[3] With no specific contract or warranty terms, Plaintiff has not established the privity required to maintain a breach of contract or express warranty claim in California. *Yu-Santos v. Ford Motor Co.*, No. 1:06- CV-01773-AWI-DLB, 2009 WL 1392085, at *20 (E.D. Cal. May 14, 2009) (citing *Blanco v. Baxter Healthcare Corp.*, 158 Cal. App. 4th 1039, 1058-59 (2008)).

Compl. ¶¶ 103-04. This abandonment suggests Plaintiff recognizes other potential deficiencies in any express warranty claim, including his failure (and likely inability) to allege that he presented his Chevrolet Volt for repair of any deficiencies in materials and workmanship and the fact that his limited warranty simply does not cover alleged "design defects." *See, e.g.*, *Trusky v. Gen. Motors Co*., 2013 Bankr. LEXIS 620, at *18, *19 (Bankr. S.D.N.Y. Feb. 19, 2013) (". . . GM can be required [under the warranty] to replace spindle rods that were defective because of materials or workmanship with new spindle rods of the same design within the warranty period, but it cannot be required to change the design of the spindle rods.").

Without allegations showing a plausible factual basis for the existence of any contract with GM or the essential terms of any warranty, Count V must be dismissed under *Iqbal* and *Twombly*. *See Zody*, 2012 WL 1747844, at *4 (citing *Twombly*, 550 U.S. at 555).

D. The Complaint Fails To State A Privacy Claim Under The California Constitution (Count VIII).

Plaintiff Nisam does not allege sufficient facts to state a plausible claim for invasion of privacy under the California Constitution. To allege a violation of his state constitutional right to privacy, a plaintiff must assert facts establishing "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the] defendant constituting a serious invasion of privacy." *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994). Plaintiff Nisam does not allege any facts showing any of these three required elements. *See, e.g.*, *Scott-Codiga v. Cnty. of Monterey*, No. 10–CV–05450, 2011 WL 4434812, at *7 (N.D. Cal. Sept. 23, 2011) (dismissing right to privacy claim brought under the California Constitution where plaintiff failed to plead the threshold elements with adequate specificity).

1. Plaintiff Nisam Does Not Allege Invasion Of A Legally Protected Privacy Interest.

"Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." *See Hill*, 7 Cal. 4th at 35. Plaintiff Nisam purports to assert a claim under the first category by claiming a

"legally protected privacy interest in . . . the geographic location of [his] vehicle[] at various times." Am. Compl. ¶ 135. The "information privacy" plaintiff identifies, as a matter of law, is not protected.

The California Constitution does not create a legally protected privacy interest in *all* consumer information. It protects only information that is "sensitive and confidential." *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1041 (N.D. Cal. 2014). "A particular class of information is private [and therefore sensitive and confidential] when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." *Hill*, 7 Cal. 4th at 35. Applying these precedents, California courts have required particularly sensitive information to support a legally protected privacy interest, such as a confidential medical profile, private financial records, sexual orientation, and sexual activity. *See, e.g.*, *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 712 (9th Cir. 2005) (medical profile); *Charles O. Bradley Trust v. Zenith Capital LLC*, No. C–04–2239 JSW(EMC), 2006 WL 798991, at *1-2 (N.D. Cal. Mar. 24, 2006) (private financial records); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1196 (C.D. Cal. 2007) (sexual orientation); *Pearce v. Club Med Sales, Inc*., 172 F.R.D. 407, 410 (N.D. Cal. 1997) (sexual activity).

Plaintiff Nisam fails to assert the invasion of any sensitive and confidential information. Rather, he seeks protection of information on the geographic location of his vehicle "at various times." Am. Compl. ¶ 135. The disclosure of "[a] person's general location is not the type of core value, informational privacy explicated in *Hill*." *Fredenburg v. City of Fremont*, 119 Cal. App. 4th 408, 423 (2004). Mr. Nisam does not, and cannot, reasonably assert that one ordinarily expects a car's location on public streets to be private. Nor has he explained why any potential dissemination of this information would injure him.[4]

[4] The complaint also refers to the collection of vehicle performance data generally (Am. Compl. ¶ 50) without alleging that Plaintiff Nisam's vehicle performance data has been collected by GM. But even if such an allegation had been made, as shown above, vehicle performance data also is not the kind of "sensitive" and "confidential" data California courts find to be protected from collection. Moreover, Plaintiff does not allege that the collection of such data has been harmful to him.

2. Plaintiff Nisam Does Not Allege A Reasonable Expectation Of Privacy In The Data.

To meet the second prong of an invasion of privacy claim, a plaintiff must allege an objectively reasonable expectation of privacy in the information he seeks to protect. *Hill*, 7 Cal. 4th at 37. This element rests on an examination of the "customs, practices, and physical settings surrounding particular activities. . . . [O]pportunities to consent voluntarily to activities impacting privacy interests obviously affect [] the expectation of the participant." *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 370-71 (2007) (internal citations and quotation marks omitted) (alterations in original); *see also In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1037-38 (The reasonableness of a plaintiff's privacy expectation "must take into account…advance notice to Plaintiff, and whether Plaintiff had the opportunity to consent or reject the very thing that constitutes the invasion." (internal quotation marks and alterations omitted)). Courts dismiss on the pleadings privacy claims like Mr. Nisam's where the allegations show no reasonable expectation of privacy, *see Hill*, 7 Cal. 4th at 40, and where plaintiffs make conclusory allegations unsupported by fact, *see In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1041 (when "Plaintiffs' allegations are simply a bare recitation of the elements of a privacy claim," a court "cannot assess whether Plaintiffs had . . . a reasonable expectation of privacy" in information). Plaintiff Nisam's invasion of privacy claim fails for both reasons.

First, Mr. Nisam does not identify any information in which he would have a reasonable expectation of privacy. He concedes that GM "make[s] drivers aware of [its] data collection in owners' manuals, online "privacy statements," and terms & conditions of specific feature activations . . ." Am. Compl. ¶ 50. A consumer cannot reasonably expect privacy in data where a manufacturer has explicitly provided notice and obtained consent to its collection. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1041 ("The plaintiff in an invasion of privacy action must . . . not have manifested by his or her conduct a voluntary consent to the invasive action of defendant."); *see also Berry v. Webloyalty.com, Inc.*, No. 10–CV–1358–H (CAB), 2011 WL 1375665, at *10 (S.D. Cal. Apr. 11, 2011), *vacated and remanded on other grounds*, 517 Fed. App'x 581 (9th Cir. 2013) (dismissing invasion of privacy claims because plaintiff had no "reasonable expectation of

privacy . . . where Plaintiff consented to have his billing information shared").

Second, Plaintiff Nisam's invasion of privacy claim fails because he alleges his claim in pure conclusory fashion. He asserts only a "reasonable expectation of privacy in [his] personal data." Am. Compl. ¶ 136. His pleading on this issue ends there. He fails to allege any detail as to why this expectation is objectively reasonable. While Plaintiff Nisam complains that he is unable to opt out of certain collection practices, *see* Am. Compl. ¶ 50, he does not sufficiently identify those practices, so there is no factual basis for a plausible claim for relief.

3. Plaintiff Nisam Does Not Allege A "Serious" Invasion Of Privacy.

Plaintiff Nisam has not asserted a "serious" invasion of privacy under California law. '"Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an *egregious breach* of the social norms underlying the privacy right.'" *In re iPhone Application Litig*., 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (quoting *Hill*, 7 Cal. 4th at 26, 37). The transmission of one's geographic information, however, does *not* constitute an egregious breach of social norms. *See id.*, 844 F. Supp. 2d at 1063 (dismissing claim because "[h]ere, the information allegedly disclosed to third parties included the unique device identifier number, personal data, and geolocation information from Plaintiffs' iDevices. Even assuming this information was transmitted without Plaintiff's knowledge and consent . . . such disclosure does not constitute an egregious breach of social norms."); *Yunker v. Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013 WL 1282980, at *15 (N.D. Cal. Mar. 26, 2013) (finding allegations that defendant provided plaintiffs' personally identifiable information, including geolocation information, to advertising libraries insufficient to show egregious breach of social norms); *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992 (2011) (upholding dismissal of claim because "the supposed invasion of privacy essentially consisted of [Defendant] obtaining plaintiff's address without his knowledge or permission, and using it to mail him coupons and other advertisements. This conduct is not an egregious breach of social norms. . .

.").[5] Plaintiff Nisam's allegations of GM's collection of data simply do not constitute the serious invasion of privacy California courts require, and thus his invasion of privacy claim cannot stand.

E. Plaintiff Nisam's Fraud-Based Claims Must Be Dismissed (Counts I, II, III and VI).

Plaintiff's claims under the UCL (Count I), CLRA (Count II), and FAL (Count III), and his common law claim for fraud by concealment (Count VI) are fraud-based. Under Federal Rules of Civil Procedure 9(b) and 12(b)(6), these claims must be pleaded with particularity. The Court should dismiss these claims for: (1) failure to satisfy Rule 9(b)'s heightened pleading requirements; and (2) failure to allege reasonable or justifiable reliance.

1. Plaintiff's Fraud-Based Allegations Are Subject To Rule 9(b)'s Heightened Pleading Requirements.

Plaintiff Nisam's "fraud by concealment" claim is a cause of action for fraud and is therefore subject to Rule 9(b)'s heightened pleading standard. *Taragan*, 2013 WL 3157918, at *5. Rule 9(b) also applies to all claims—including claims under the UCL, the CLRA, and the FAL—that are "grounded in fraud" or that "sound in fraud." *Kearns*, 567 F.3d at 1125; *see also Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1153 (N.D. Cal. 2007) ("To establish a fraud claim under California law, a plaintiff must show: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage.").

Plaintiff premises his UCL, CLRA, and FAL claims on alleged misrepresentations, omissions and concealment concerning the "hackability" of the CAN bus system. *See, e.g.*, Am. Compl. ¶¶ 5, 6, 26-27, 36, 65-66, 74, 78-80, 83, 87-88, 108-110, 112-116. Plaintiff alleges, for instance, that Defendants engaged in "unfair, deceptive, and/or fraudulent business practices," *id.* ¶ 6; "knowingly and intentionally conceal[ed]" information from plaintiffs," *id.* ¶ 65; made "material omissions and misrepresentations," *id.* ¶ 78; and "concealed and/or suppressed material facts," *id.* ¶ 108. Because Plaintiff Nisam alleges fraud to support his UCL, CLRA and FAL

[5] *Contrast Hill*, 7 Cal. 4th at 40-41 (direct observation of urination by a monitor sufficiently egregious invasion); *Egan v. Schmock*, 93 F. Supp. 2d 1090 (N.D. Cal. 2000) (stalking and filming of neighbors in their home sufficiently egregious invasion).

claims, they must be pleaded with particularity.

2. Plaintiff Nisam Fails To Allege His Fraud-Based UCL, CLRA And FAL Claims With Particularity.

To satisfy Rule 9(b), a pleading must identify "the who, what, when, where and, how of the misconduct charged," and "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Kearns*, 567 F.3d 1120 at 1124 (internal quotation marks omitted); *see also* Rule 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). To plead an actionable fraud-based claim under California's consumer protection statutes, moreover, a plaintiff must plausibly allege that a reasonable consumer would likely be deceived by the business practice or advertising at issue. *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 854 (N.D. Cal. 2012). Plaintiff fails to allege with particularity any of the three bases on which he asserts fraud, and that a reasonable consumer would be deceived by GM's conduct.

First, Plaintiff Nisam does not allege with particularity that GM made misrepresentations.[6] He identifies only two assertions by GM:

- "Quality and safety are at the top of the agenda at GM, as we work on technology improvements in crash avoidance and crashworthiness to augment the post-event benefits of OnStar, like advanced automatic crash notification." Am. Compl. ¶ 47.
- "General Motors today revealed that the development of one of the largest active automotive safety testing areas in North America is nearly complete at its Milford Proving Ground campus. The Active Safety Testing Area will complement the Milford Proving Ground's vast test capabilities and increase GM's ability to bring the best new safety technologies to the customer." *Id.* ¶ 48.

Mr. Nisam does not allege, among other things, the manner in which these representations were communicated to him (if at all), when they were communicated to him, how they were

[6] Only Mr. Nisam's CLRA claim asserts a misrepresentation.

communicated to him, or how they influenced his decision making[7] or misled him into believing that a third party could not criminally and maliciously "hack" his vehicle. Mr. Nisam likewise does not allege how these general statements regarding GM's commitment to safety would lead a reasonable consumer to believe that GM's cars cannot be the subject of criminal third-party conduct. Further, none of the representations that Mr. Nisam complains of describe his Chevrolet Volt or even a specific GM vehicle, nor are these statements "specific and measurable" claims that are capable of being proved true or false and therefore are not actionable. *See Rasmussen v. Apple, Inc.*, 27 F. Supp. 3d 1027, 1039 (N.D. Cal. 2014) ("'misdescriptions of specific or absolute characteristics of a product are actionable,'" but statements "'merely . . . in general terms . . . [are] not actionable'"). Plaintiff thus fails to allege any misrepresentation *of fact* by GM with the requisite particularity. *See, e.g.*, *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007) ("Although Plaintiffs identify specific comments from Defendant's website . . . they fail to specify the time frame during which these comments appeared. Nor have Plaintiffs identified any other specific advertisements that are allegedly false.").

Second, Plaintiff's complaint is devoid of support for his suggestion that GM "concealed" information. To satisfy Rule 9(b) when allegations of fraud rest upon claims of concealment, a plaintiff must specify affirmative acts of concealment. *Taragan*, 2013 WL 3157918, at *6. Plaintiff fails to do so. Instead, he alleges concealment by GM in purely conclusory fashion. *See, e.g.*, Am. Compl. ¶ 65(a) (GM "knowingly and intentionally conceal[ed] from Plaintiffs and the other California Class members that the Class Vehicles suffer from a design defect while obtaining money from Plaintiffs"); *id.* ¶ 108 ("Defendants concealed and/or suppressed material facts concerning the safety, quality, functionality, and reliability of their Class Vehicles").

Third, Plaintiff fails to adequately plead facts supporting his conclusory assertion that GM made "omissions." *See, e.g.*, *id.* ¶¶ 78, 87. He does not indicate, for instance, the content of the omission or where the omitted information could or should have been disclosed. *See also*

[7] The second statement affirmatively could not have influenced his decision to purchase his car since GM issued that press release more than 18 months after the date that Mr. Nisam alleges that he purchased his car. Am. Compl. ¶ 48.

Marolda v. Symantec Corp., 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009) ("to plead the circumstances of omission with specificity, plaintiff must describe the content of the omission and where the omitted information should or could have been revealed").

For an omission to be actionable under California's consumer protection statutes, a plaintiff must allege a duty to disclose or facts "showing that the alleged omissions are 'contrary to a representation actually made by the defendant. . . .'" *Davidson*, 76 F. Supp. 3d at 972 (quoting *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006)); *see also Taragan*, 2013 WL 3157918, at *6 (for an omission to be actionable in fraud a plaintiff must allege facts creating a duty to disclose). Plaintiff Nisam contends that GM owed a duty to disclose for three reasons: (1) "[GM] marketed [its] Class Vehicles as safe," when they are not, Am. Compl. ¶ 109, (2) GM had "superior knowledge and access to the facts," *id.* ¶ 110, and (3) GM "possessed exclusive knowledge" of the alleged defect. *Id.* ¶ 111. All three assertions fail as a matter of law.

Plaintiff's complaint lacks any allegation that his vehicle functioned in any manner other than as intended; he alleges only that it is "susceptible" to "hacking." His claim therefore is entirely speculative. *See Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 990-91 (N.D. Cal. 2010), *aff'd* 462 Fed. App'x 660, 663 (9th Cir. 2011) (allegations that a defect could, among other things, potentially make a vehicle vulnerable to theft held too speculative as a matter of law to assert a safety defect that creates a duty to disclose). Plaintiff Nisam similarly asserts that his vehicle is vulnerable to third-party criminal conduct, and therefore fails to allege a material safety hazard that gives rise to a duty to disclose.

Moreover, "[t]he existence of a safety hazard does not, standing alone, give rise to a duty to disclose." *Taragan*, 2013 WL 3157918, at *6, n.9. Only a "material" safety hazard must be disclosed. *Id.* To prove that non-disclosed information is material, a plaintiff "must be able to show that had the misrepresented or omitted information been [] disclosed, [a reasonable consumer] would have been aware of it and behaved differently." *Winans v. Emeritus Corp.*, No. 13-CV-03962-SC (JCS), 2014 WL 3421115, at *2 (N.D. Cal. July 14, 2014); *Garcia v. Sony Computer Entm't Am., LLC*, 859 F. Supp. 2d 1056, 1067 (N.D. Cal. 2012). Plaintiff does not

allege that a reasonable consumer would expect a car to be impervious to third-party criminal acts. His claim is no different from, and just as absurd as, a claim that GM should be required to disclose that all vehicle brakes are defective because a criminal could cut the brake line or remove the brake fluid.

Conclusory allegations of "superior knowledge" of a defect are likewise insufficient to create a duty to disclose. *Taragan*, 2013 WL 3157918, at *6 (finding it insufficient under Rule 9(b) to allege merely that "the defendant has a superior understanding about the product's design generally"). And, to adequately allege a defendant's exclusive knowledge (another basis for asserting an actionable omission) of an alleged defect, a plaintiff "must offer 'specific substantiating facts.'" *Taragan*, 2013 WL 3157918, at *6. Plaintiff fails to do so.

At bottom, Plaintiff seeks to assert fraud-based claims, but his complaint is bereft of allegations of the "who, what, when, where and how" of the alleged fraud. Plaintiff thus fails to meet his pleading obligations, and Counts I, II, and III should be dismissed. Concealment and a duty to disclose are both elements of Plaintiff's fraudulent concealment claim. *Taragan*, 2013 WL 3157918, at *6. Plaintiff's failure to allege these elements is equally fatal to that claim.

3. Plaintiff Nisam Does Not Allege Reasonable Or Justifiable Reliance.

Reliance is an "essential" element of any claim based on fraud or misrepresentation, including claims brought under California's consumer protection statutes. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1116 (9th Cir. 2008); *see Kearns*, 567 F.3d at 1126. To satisfy pleading requirements, there must be more pled than a simple statement plaintiff justifiably relied on the statements. *Foster Poultry Farms v. Alkar-Rapidpack-MP Equip., Inc.*, No. 1:11–cv–00030–AWI–SMS, 2012 WL 6097105, at *7 (E.D. Cal. Dec. 7, 2012). The complaint must "allege facts showing that the actual inducement of plaintiffs . . . was justifiable or reasonable." *Id.* (citation and internal quotation marks omitted). It is not enough to identify alleged statements by the defendant; instead, the complaint must "provide an unambiguous account of the time, place, and specific content of the false representations." *Smedt v. Hain Celestial Grp.*, No. 5:12-cv-03029, 2013 WL 4455495, at * 4 (N.D. Cal. Aug. 16, 2013) (internal quotation marks and citation omitted); *accord Kearns*, 567 F.3d at 1126. "A mere conclusory allegation that the

plaintiff relied on the misrepresentation is insufficient." *Foster Poultry Farms*, 2012 WL 6097105, at *7. Mr. Nisam's allegations of "reliance" are deficient.

Plaintiff's allegations of fraud rest upon two statements GM allegedly made, yet he does not, and cannot, allege that he relied upon either of these statements in deciding to purchase his vehicle. One such statement, according to Plaintiff, was made on October 23, 2014—more than a full year-and-one-half *after* Plaintiff alleges he purchased his GM vehicle. Am. Compl. ¶ 48. Plaintiff neglects altogether to allege when GM made, or when he received, the remaining representation, *see generally* Am. Compl., except to allege that he last reviewed that statement on June 30, 2015, two years *after* he allegedly purchased his vehicle, Am. Compl. ¶ 47 n.30. Statements viewed *after* a plaintiff's purchase could not have induced that purchase.

Plaintiff likewise fails to demonstrate that, even if he had relied on GM's statements, his reliance was reasonable. Specifically, the two GM statements to which Mr. Nisam refers concern crashworthiness, crash avoidance, and the opening of a facility to test new technologies. *Id.* ¶¶ 47, 48. Neither of these statements has any relationship to Plaintiff's claimed defect: "susceptib[ility] to hacking." Crashworthiness and crash avoidance have nothing to do with CAN bus security. A commitment to testing safety technologies in the future, made 18 months after Plaintiff's purchasing decision, has no bearing on the features or characteristics of Plaintiff's own vehicle or his choice of car. Because Plaintiff fails to allege reliance, much less reasonable and justifiable reliance, his fraud-based claims should be dismissed.

CONCLUSION

For the foregoing reasons, GM respectfully requests that Plaintiffs' complaint be dismissed in its entirety.

Dated: August 28, 2015

CROWELL & MORING LLP

BY: /s/ Cheryl A. Falvey

Attorneys for Defendant General Motors LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 28th day of August, 2015.

/s/ Rebecca B. Chaney